

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
APPENDIX**

77-2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL J. MURELLO,

Petitioner-Appellant,

-against-

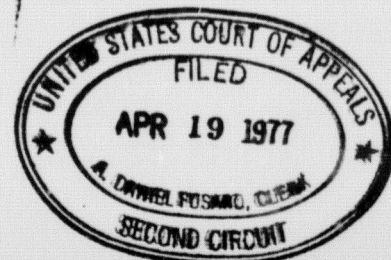
THE SUPREME COURT, STATE OF NEW YORK, COUNTY
OF KINGS, and HON. EUGENE GOLD, District
Attorney, Kings County,

Respondents-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW
YORK

APPELLEES' SUPPLEMENTAL APPENDIX

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3

4 -----X
5 M. J. MURELO, :
6 Plaintiff, : 76-C-2043
7 -against- :
8 THE SUPREME COURT, STATE :
9 OF NEW YORK, :
10 Defendant. :
11 -----X

12 United States Courthouse
13 Brooklyn, New York

14 December 8, 1976
15 4:00 o'clock p.m.

16 B e f o r e :

17 HONORABLE EDWARD R. NEAHER, U.S.D.J.
18
19
20
21

22 PERRY AUERBACH
23 ACTING OFFICIAL COURT REPORTER
24
25

Appearances:

RICHARD T. FARRELL, ESQ.
Attorney for Petitioner

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State of New York

BY: DAVID L. BIRCH, ESQ.
Assistant Attorney General

1
2 THE CLERK: Civil motion, M.J. Murelo v.
3 The Supreme Court of the State of New York.

4 MR. FARRELL: Ready.

5 MR. BIRCH: Ready for the respondent.

6 MR. FARRELL: Good afternoon, your Honor.

7 MR. BIRCH: Good afternoon, your Honor.

8 THE COURT: Good afternoon.

9 Now, who is Professor Farrell?

10 MR. FARRELL: I am, sir.

11 THE COURT: Now, you are the proponent here?

12 MR. FARRELL: Yes, sir.

13 THE COURT: And have you been served copies of
14 the Attorney General's briefs?

15 MR. FARRELL: As you will note from the back of
16 the brief and the affidavit, it was served to me this
17 afternoon.

18 THE COURT: All right. Now, do you want to
19 make some remarks to the Court, or would you like me
20 to put a question to you?

21 MR. FARRELL: Your Honor, I am sure that the
22 Court has had sufficient time to familiarize itself
23 with the essential issues in the case.

24 The only observation I can make at the opening
25 -- I am not going to apologize for faulty research --

1 just today, I was able to get a hold of a copy of the
2 opinion of the Court of Appeals, Second Circuit in the
3 case of Palermo v. the Warden, a decision of the Court
4 of Appeals decided by that court, a panel of Justice
5 Weitzman and Messrs. -- with Judge Bartels presiding
6 on July 1st of this year.

7 The only citation I can afford for that case,
8 that is its numbers, 1341, 42 and 43 of the September
9 term, '75 calendar of the Court of Appeals of the
10 Second Circuit.

11 I would like to incorporate that particular
12 case into our brief, since it follows -- as we
13 suggested this Court followed Santabello v. New York,
14 that is when the deal falls through due process of law
15 requires that the defendant be given one of two
16 options: that is, his option to take his chances or
17 the option to withdraw his plea of guilty.

18 In this case, the defendant wasn't given what
19 Santabello requires, what the Constitution requires,
20 and that is, the opportunity if not the right to
21 withdraw his plea of guilty and return to his plea of
22 not guilty and take his chances on the indictment.

23 Unlike Selikoff v. New York, there's been
24 through the Court of Appeals in New York, and in the
25 second end, Murelo isn't looking for the promise

1 originally made by Judge Titone. All he wants to do
2 is go back to trial on the two indictments.

3 That's what Mr. Darienzo asked for the first
4 time, Judge. That's all that Darienzo asked for at
5 the time this case finally came on for sentencing in
6 three years in June of 1973, and that's all we want
7 here.

8 What the Constitution requires, whether the
9 defendant asked for it or what the defendant is
10 entitled to.

11 Unfortunately, now for the United States
12 District Court, it can now be in the position of
13 directing the Supreme Court of the State of New York
14 now to do what it should have done three years ago,
15 and that's let Murelo withdraw his plea of guilty.

16 I am not going to take cheap shots at the
17 Supreme Court of New York, but heck, we should have
18 been finished with this case in the Appellate Division.

19 That's my opening, your Honor. If you have a
20 question I would be perfectly delighted to answer it.

21 THE COURT: Yes. My question is based on a
22 problem I do have. The original record, of course,
23 I suppose remains unchanged, but I notice in the
24 affidavit in opposition of the Assistant Attorney
25 General, that he takes the position that this point about

1 the nature of the plea bargain has changed colors
2 from the time it was first urged in the State Court;
3 that is to say, what I find troubling is that counsel,
4 for example, back on May 18, 1973, before sentence was
5 imposed, defense counsel said to the sentencing judge,
6 "I understand that your Honor did offer probation, of
7 a fine or possible probation if there was no
8 subsequent arrest in the interim period, and of course
9 we agreed to that, and that is part of the record."

10 Now, what I am getting confused about is if
11 that was indeed the offer, what does your client have
12 to complain about?

13 MR. FARRELL: Point No. 1, you're referring,
14 of course, to page A-16 of the minutes of the
15 proceedings in May of 1973.

16 THE COURT: Right.

17 MR. FARRELL: It's our Exhibit A, page A-16
18 thereof.

19 When Mr. Darienzo was speaking in -- into that
20 passage your Honor referred to, he said this is a
21 matter of record. Mr. Darienzo apparently had access
22 to that record that nobody in the world had access to.
23 There's nothing else on the record.

24 THE COURT: Look, if we took it literally, your
25 client was asked right at the outset, "Have any threats

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or promises been made to you by the District Attorney,
any officer of the Court, or the Court itself?"

And the defendant answered in the negative.

MR. FARRELL: In front of Judge Titone who --

THE COURT: I know. But you can't have it both
ways.

MR. FARRELL: We don't want to have it bothways.

THE COURT: Now, he's saying no promises were
made. Then he says, "Yes," a promise was made, but now
he says the promise that was made wasn't kept, although
the fact is he was arrested. That's what's troubling
me.

MR. FARRELL: Three observations on that.

No. 1, at page A-11 of the minutes of the
sentence, that is Judge Titone speaking, this is
Judge Titone, you have the same in front of you,
"No promises were made to me." And Judge Titone heard
him say that. He said, "I took a plea. I promised
him probation."

THE COURT: I grant you that. Now, the Judge
says, "Despite your disclaimer that I made you a
promise, I admit I made you a promise, but the big
question is what promise did I make you, and I said
I promised you probation if you wouldn't get into
trouble."

1 MR. FARRELL: Assuming for the purposes of the
2 argument right now that that was what the Judge said,
3 and that is what Murelo heard, but that is just
4 arguendo.

5 Now, we come to the point where Murelo gets
6 busted, if you would. Not only does he get arrested,
7 but before sentence was pronounced he was indicted.
8 Parenthetically, once I can establish that in reference
9 to the records of the Kings County Supreme Court, that
10 that third cigarette charge was ultimately dismissed.

11 THE COURT: I don't see how I can consider the
12 inadequacy of the charge.

13 MR. FARRELL: That's not the point at all.
14 Assuming that Murelo did know that the promise of a
15 year and a year if you stay out of trouble, he gets
16 into trouble. Now, how much of the deal is off, your
17 Honor? Is the whole deal off? That's what we say.

18 THE COURT: Well, he pleaded guilty to two
19 misdemeanors, each of which could have carried a year;
20 correct?

21 MR. FARRELL: Sure.

22 THE COURT: And could have been consecutive,
23 as he understood that.

24 MR. FARRELL: And understood that there was a
25 sentence consideration that came along with it.

1 THE COURT: Right. But my point is, it seems
2 to me he's in a box either way. If you say we must
3 take the record literally, he agreed there was no
4 promise at all. If we depart from the literal record
5 and accept the Judge's statement of what the promise
6 was, the promise was, "I'll consider you for Probation
7 provided you don't get into trouble prior to the time
8 I impose the sentence."

9 And then his lawyer, as I point out to you in
10 that statement on May 18th, which is back at page A-15,
11 A-16, Mr. Darienzo, who I gather was the same counsel
12 who represented him throughout, did he not?

13 MR. FARRELL: From the time these minutes begin,
14 yes.

15 THE COURT: Right. And Mr. Darienzo says,
16 "Judge, I understand at the time of the plea your Honor
17 did offer probation, of a fine and possible probation" --

18 "Of a fine and possible probation if there was
19 no subsequent arrest during this interim period, and
20 of course we agree to that, and that is part of the
21 record."

22 Now, I must confess it doesn't appear on the
23 record, but this is his own counsel --

24 MR. FARRELL: The problem --
25

1 THE COURT: (Continuing) -- corroborating the
2 Judge that there was a condition attached to this
3 promise of Probation, and it would appear that how-
4 ever seriously we think the condition was broken or
5 breached, it was, I gather. I'm trying to find out
6 what kind of hearing, in other words, could a federal
7 court conduct on this case on that state of the record.

8 MR. FARRELL: Well, let's see.

9 THE COURT: That's my problem.

10 MR. FARRELL: I came here this afternoon and I
11 am not going to leave here until I try to convince
12 you that you can decide this case as it stands
13 without putting a witness in the box. I have Murelo
14 here.

15 THE COURT: You put Murelo in the box and he
16 will give his version of what occurred, but what about
17 his lawyer?

18 MR. FARRELL: Well, we would need --

19 THE COURT: Who was there, too.

20 MR. FARRELL: We would have Murelo,
21 Mr. Darienzo, Judge Titone, the Assistant District
22 Attorney who handled this case, whose name I forgot.
23 I think we have got everything we need in the papers
24 as they stand right now.

25 THE COURT: Let me hear you.

1 MR. FARRELL: Here's what we have. Let me try
2 to put it in the worst possible light for my client.
3 I think we still come out ahead. The promise is made,
4 no ifs, ands or buts about it.

5 THE COURT: Now, the question, though, still
6 is: What promise was made?

7 MR. FARRELL: I'll make up the promise to
8 make it as bad as possible for me. Here's the deal.
9 You have got two felony indictments, plead guilty to
10 misdemeanors, stay out of trouble with Probation,
11 period. Okay, now, that's the promise. Micky's
12 probation, if you stay out of trouble.

13 THE COURT: That implies if you don't stay
14 out of trouble.

15 MR. FARRELL: That's the problem. What does
16 it imply?

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18 (continued next page)
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THE COURT: He could be sentenced.

MR. FARRELL: I don't know if you can say that, Judge.

THE COURT: I say that follows like the night follows day.

MR. FARRELL: Let's take a look at the affidavit in opposition. Mr. Birch's affidavit -- some place, either in his affidavit or his brief, I must confess I didn't have time to commit it to memory, he points out that Murelo is no stranger to CJA.

THE COURT: He says that's a consideration the Federal Court should take in consideration in determining whether or not this prisoner's protestation or what the promise was what he says it was.

MR. FARRELL: Even Mike Murelo, not a member of the New York Bar, he'll never get into the Bar with his reputation, even he knew enough if you can't keep your deal with Judge Titone just go away, I can't keep my part of the deal, you can't keep yours. The deal is off. The plea promise, goes and where's Murelo? He's left back status quo.

THE COURT: I understand that. But of course the implicit premise of that argument is that the deal

1
2 was, "You will get probation, period." Whereas, that's
3 not what the record says.

4 MR. FARRELL: The record is ---

5 THE COURT: The record says you will get
6 Probation if, and Mr. Darienzo says not once but
7 twice, he says, "Judge, I would ask that despite the
8 subsequent arrest, perhaps your Honor will still
9 consider placing him on probation with a fine."

10 Now, that certainly implies the attorney's under-
11 standing that the Judge has a right to do something
12 other than probation or fine or both.

13 MR. FARRELL: Excuse me, your Honor. That's
14 what makes C students, defective understanding of
15 what the law is.

16 THE COURT: Well, Prof. Farrell, I want to say
17 that I admire your public spirit and your diligence,
18 and I wish to God I had more like you on all the
19 other habeas corpus proceedings I had, where they come
20 in pro se, and I have to play both Judge and lawyer
21 in the cases, and I am not trying to sweep you out of
22 Court here, particularly since I have got the
23 Assistant District Attorney on his feet. I might
24 abstract some damaging admissions from him, I don't
25 know.

1 I am puzzled here as to exactly what the
2 necessity would be for a hearing in the case in the
3 light of the record as it now stands, because
4 certainly at the very least although I will let him
5 argue the point, maybe you can shoot a hole or two
6 into it, he says that this case went up to the Court
7 of Appeals on a different question than is now
8 sought to be presented to me.

9 MR. FARRELL: I know he says that, your Honor,
10 but he also says --

11 THE COURT: That's serious from our standpoint.

12 MR. FARRELL: I know it is.

13 THE COURT: We constantly don't decide
14 questions which haven't first been presented to the
15 State Courts.

16 MR. FARRELL: I'm going to make an admission,
17 but this is going to affect my client. Mr. Birch was
18 good enough to furnish copies of the Appellate'
19 Division brief, the brief of the Court of Appeals.
20 It was written by yours truly. So was the brief in
21 the Court of Appeals. The brief in this court was
22 written by me. There is not a heck of a lot of
23 difference between the Court of Appeals brief and
24 this brief before the Court. The one thing that
25 Mr. Birch has done is has dredged up out of one

1 allegation paragraph 13 of the petition.

2 THE COURT: 13 of the petition?

3 MR. FARRELL: Excuse me, your Honor.

4 Paragraph 12 of the petition.

5 THE COURT: The petitioner is not aware of
6 the condition?

7 MR. FARRELL: That one sentence, I mean, if I
8 quit right now, I would cross out that allegation,
9 take Exhibit C out of the record, throw it away,
10 because it doesn't add or detract from our position.
11 That's where he finds the position. Our position isn't
12 any different than that affidavit by Murelo.
13 Exhibit C was added by me to enhance the picture, not
14 to change it, not to change the thrust of our argument.
15 We rely on the same authorities in this court that
16 we relied on in the Court of Appeals in the State of
17 New York,

18 We relied on the state of the record. I know
19 your Honor has a lot of things to do. Your Honor can
20 have a member of your staff compare my brief with the
21 brief of the Court of Appeals.

22 THE COURT: Part of the problem is compounded
23 by what the Court of appeals wrote, because they seem
24 to write what their understanding of the matter was,
25

1 and it's a little difficult for me to challenge
2 their understanding of it. It's one thing to overrule
3 them on their construction of the law. I did that last
4 week in the Drake case, and I don't know where that
5 one is going.

6 I assume it's going to the Second Circuit, but
7 they had the definite impression that there was a
8 conditional promise made, and certainly on this
9 record I don't see how one could take issue with the
10 conditional promise when the petitioner's own counsel
11 then on two different occasions acknowledged that
12 there was such a condition.

13 MR. FARRELL: But Judge, the point is that
14 every plea that's taken is on the same condition
15 whether it's articulated or not. Consider, if you
16 will, Sheldon Selikoff. Now, Shelly Baby has been
17 through the courts. Selikoff was allowed to plea
18 guilty in a fraud case. In the period between his
19 plea and the time he came on for sentencing, the
20 State Court Trial Judge found out that Sheldon
21 wasn't what he thought he was. He was the brains of
22 the operation.

23 THE COURT: He was a real bad guy.

24 MR. FARRELL: The judge says, "Sheldon, come
25 on, you're not what I thought you were. I am going

1 to take back the deal."

2 But now here's where the difference comes.
3 The trial judge in Selikoff says, "Shelly Babes, since
4 the deal is off I am going to give you a chance. You
5 can take back your plea."

6 What do you think he said?

7 THE COURT: "No."

8 MR. FARRELL: He said, "No," in all courts.

9 What Selikoff wanted or more precisely what
10 his attorney wants is specific importance of the
11 promise. All Murelo is entitled to is what Selikoff
12 got.

13 THE COURT: I'm in agreement with you there.

14 MR. FARRELL: If you agree with me we can issue
15 a writ.

16 THE COURT: That's the problem I have, you see,
17 because there wasn't any condition really in Shelly's
18 case, not the rule in this case.

19 MR. FARRELL: Not an articulated condition.

20 THE COURT: There wasn't a condition. There
21 wasn't anything other than, "I plead guilty on an
22 understanding that I am to get X sentence."

23 All right, now, when a judge in that
24 predicament finds that he cannot be faithful to his
25

1 oath as a judge and gives that man that sentence,
2 that defendant that sentence, then the Judge is a
3 party to the breach. Of necessity, he is unable to
4 perform. In his judgment he is unable to perform his
5 end of the bargain, the contract is null and void,
6 all bets are off, and under those circumstances
7 Shelly had a perfect right to consider all bets off,
8 but Shelly didn't want that. He wanted to set
9 specific performance.

10 Now, in this situation, Judge Titone did not
11 breach the contract, as the contract is laid out on
12 the record.

13 Unfortunately, your poor petitioner had the
14 misfortune to acquiesce in a bargain, so his attorney
15 said not once, but twice, which bargain he breached.
16 Not Judge Titone. It wasn't as though Judge Titone
17 said to him, "Look, you have got a year's probation."

18 Then we have a Shelly case. At the end of the
19 line he gets the pre-sentence report, he's found out
20 that the guy was arrested and he's being indicted,
21 and he says to him at that point, "I couldn't possibly
22 give you probation on this."

23 I would say under those circumstances I think
24 it would be like Shelly, and there would be a
25 situation where the fellow would be then given the

1 option, "All right, stand trial."

2 Now, of course that's a tough decision, because
3 he stands trial, as I understand it, on two felony
4 counts which might carry up to four years on each
5 count. He could get up to eight years, but it didn't
6 work out that way. He, according to the record
7 presented below the error that was considered by the
8 Court of Appeals, it was understood that this is a
9 conditional offer of which he could be deprived if he
10 did something in the interim. That's the way it was
11 spelled out. I can't see it any other way. That's
12 why I am trying to figure out what kind of a hearing
13 we could hold here that would produce any facts that
14 would change his record.

15 We would have to have Judge Titone come here
16 and say, "I didn't mean what I said. I didn't make
17 any promise at all," which is, as he said, "I asked
18 him, did I make any promises?" And he said, "No,
19 and that's the truth." or he could say, "Well, I am
20 hooked here. I made him a conditional promise and
21 it was clear to him, as his attorney said, and he
22 breached the promise and he loses the deal."

23 What you are saying is when he loses the deal
24 it's a rescission.

25 MR. FARRELL: Yes.

1 THE COURT: And he's back to "I now go to
2 trial." But that isn't so, because a guilty plea is
3 a man's admission that I am guilty of these crimes,
4 and this man, in effect, is saying, "Although I have
5 pleaded guilty in a voluntary manner fully knowing
6 what I am doing, I want you to let me ask, because I
7 did something bad in the interim which now prompts you
8 to give me a greater sentence than I thought I might
9 be able to get if I had kept my nose clean."

10 MR. FARRELL: I can't walk away from the
11 lecture without making --

12 THE COURT: One final pitch.

13 MR. FARRELL: You have heard that one before
14 this. I promise this is the final pitch unless I get
15 rebuttal. The only difference between Selikoff and
16 Murelo, as I see it, is that in Selikoff the condition
17 on performance was implicit, and Murelo, the condition
18 on performance was expressed. That's the only
19 difference.

20 THE COURT: Except as I pointed out to you, I
21 think the Judge was the one who said, "I cannot, I
22 cannot perform my promise to you because I have
23 discovered contrary to my original understanding."

24 In other words, what he was saying is, "I am
25 rescinding our contract because I entered into it

1 under a false state of facts," whereas your man is
2 saying, "I am asking for rescision because although I
3 promised to plead guilty with the understanding that
4 I would be given a probation if I remained a good boy,"
5 he's saying, "Now, because I have been a bad boy I
6 should be let out of my bargain."

7 MR. FARRELL: And stand trial on two indict-
8 ments and run the risk of eight years.

9 THE COURT: That's all I can say.

10 MR. FARRELL: I promised you only one last
11 observation. That promise I will keep.

12 THE COURT: All right.

13 MR. FARRELL: Thank you.

14 THE COURT: Okay. Well now, does there remain
15 anything for you to say?

16 MR. BIRCH: Not much. I think I probably
17 should not open my mouth, your Honor.

18 I should just point out one thing that
19 Prof. Farrell doesn't seem to consider.

20 THE COURT: Never say a professor doesn't seem
21 to consider anything. That's dangerous.

22 All right, go ahead.

23 MR. BIRCH: My only point is that withdrawal
24 of a plea is a discretionary act with the Court, not
25 with the defendant. Prof. Farrell thinks that

1 Mr. Murelo can come in and say, "I want to withdraw
2 the plea."

3 However, the criminal procedure law makes it
4 explicitly discretionary with the Court, and there has
5 been found here no abuse of discretion, and I think
6 in that case it's not a federal issue. As I pointed
7 out to his argument, it was a good one to the
8 Appellate Division. Now, you have a legitimate
9 constitutional deprivation, and I don't think there
10 was one here.

11 THE COURT: Well, of course, Santabello is
12 pretty strong authority to the proposition that when
13 a court, in effect, obtains the guilty plea, even to
14 a lesser offense, it is, in effect, trading off --
15 that is to say -- the defendant is giving up his
16 opportunity to go to trial with all attempted risks,
17 and he is giving the Government a victory, so to speak,
18 in saying, "You may convict me of this particular
19 lesser offense on the understanding that part of the
20 quid pro quo is that I will get a particular sentence."

21 Now, if the Court finds itself unable to carry
22 out that bargain, the Supreme Court seems to say
23 that there's only one thing that you can do, and that's
24 to give the man back his plea.

25 You give him back the consideration that he

1 offered for your consideration. You rescind the
2 contract, and he gets his right to go to trial, and
3 I don't know what the law of New York says about this,
4 but I would say in Santabello it's still good law.
5 The difficulty I have with its application in this
6 case as I tried to explain is this: I think that here
7 the breaching party to the contract, to the plea
8 bargain, is the Petitioner, not the Court. Although
9 there's an ambiguity as I am sure you would be the
10 first to acknowledge.

11 In this record, Judge Titone seems to have made
12 it very clear that there was indeed a bargain, and
13 what the terms of that bargain were, and the attorney
14 for the petitioner seems to confirm that, and it
15 seems to me that a judge could not permit the withdrawal
16 of the plea when it was the Petitioner himself, who
17 broke the agreement, who violated the condition, which
18 is what I fear one has to conclude on the record as it
19 stands. There's no issue that he was indeed arrested
20 after he had entered into the plea agreement.

21 Now, of course, Prof. Farrell may have a point,
22 that regardless of that, and this thought has
23 occurred to me, after his arrest for another crime
24 is still unresolved, suppose it turned out that it was
25 an entirely improper arrest and indictment, that is,

1 there was absolutely no merit to it and everything
2 else, it would seem unfair, I have to say, to sentence
3 a man on such a faulty basis. That is to say, to
4 impose a harsher sentence on him. Although I
5 recognize that sentences are discretionary with
6 judges, they are not a basis for coming here and
7 seeking de novo review.

8 Indeed, our own Second Circuit doesn't review
9 our sentences unless they're a result of an error of
10 law, and not because a judge imposes a longer
11 sentence than another judge might in a case.

12 That's the only thing that does trouble me,
13 whether mixing up the man's arrest and indictment.
14 I might say that I haven't completely closed the door,
15 mixing up a separate crime is a deficient basis to
16 override a plea bargain, inasmuch as whether he will
17 be sentenced on the other case still is a matter of
18 conjecture; do you understand?

19 MR. BIRCH: Right. But my response is that
20 petitioner agreed to this condition. The record as
21 it was exhausted in the state court was that
22 petitioner agreed to that condition, and in Santabello
23 the condition was broken by the prosecutor. The
24 prosecutor in Santobello said, "I will make a
25

1 recommendation."

2 THE COURT: The state walked out of the deal.
3 I understand that.

4 MR. BIRCH: Broke its promise. The Court here
5 did not make its promise. The Court gave its promise
6 and said, "Probation if you stay out of trouble."
7 He agreed to it. He got in trouble. That's all there
8 is. There's no case.

9 Petitioner has cited no case that says
10 conditional promises are invalid, and a violation of
11 due process. He agreed to it, and that's what
12 happened, and I don't think it's so far-fetched,
13 I mean it may have been totally arbitrary if the judge
14 said, "If a red car drives down the street between now
15 and sentence, then I will give you probation; other-
16 wise not."

17 That's a totally different thing.

18 THE COURT: There has to be something in the
19 man's control.

20 MR. BIRCH: Right. And I don't think this is
21 so arbitrary here, considering that he agreed to it,
22 that there's any problem.

23 THE COURT: The only thing that occurs to me
24 is yes, it is, it has to be in the man's control.
25

1
2 Suppose it was a case of mistaken identity?

3 MR. BIRCH: And the record I think the
4 Court should consider is the record of the state court.
5 Let him go back and bring a coram nobis that is not
6 the record, and exhaust the remedies.

7 THE COURT: Is there anything else you wish to
8 rebut?

9 MR. FARRELL: Rebuttal, yes.

10 Under Santobello, the discretion involved when
11 the deal falls through is the discretion to decide
12 whether to go ahead with the bargain or to let the
13 defendant out. The system works solely in favor of
14 the defendant, and it's got to work that way, because
15 the defendant's giving up too much when he pleads
16 guilty.

17 THE COURT: As counsel for the state points
18 out, though, in Santobello there was the District
19 Attorney who reneged on the deal. That's very clear.
20 There was a District Attorney who reneged. The man
21 made his plea agreement with a definite understanding
22 regarding sentence, a new prosecutor superseded the
23 former prosecutor to make a promise and say, "It's
24 all over. Give him the maximum." Under those
25 circumstances, I would say it would have been justice.

000

1 The deal is off all across the board. Give him the
2 plea back. Let him have a new trial.

3 But the problem is a nagging one, because even
4 though one might say the condition of being arrested
5 might not have been entirely within his control, one
6 must assume that the arrest was not wholly without
7 some basis related to his conduct, and I should have
8 thought, you know, the defendant under such a
9 condition would have been the very acme of punctilious-
10 ness in avoiding a breach.

11 MR. FARRELL: Your Honor, what kind of attache
12 case do you carry?

13 THE COURT: A heavy one.

14 MR. FARRELL: Suppose we were going to call
15 the local gendarmes?

16 THE COURT: That I was walking out with the
17 Clerk's daily deposits? Well, I know it could happen,
18 and I don't know whether you say, but my point is
19 that maybe this is food for the state courts if you
20 have the requisite proof, but the trouble is they
21 can say, "Well, here was a man who was allowed to
22 plead to minor offenses," misdemeanor as against a
23 felony indictment, which he could have got up to
24 eight years. He was told very explicitly, "You get
25 probation if you stay out of trouble," and after that

1 time he gets into trouble. According to the
2 definition, which I say is not an unreasonable one,
3 he gets himself arrested, it happens all the time here
4 on probation violations.

5 MR. FARRELL: Your Honor, I don't want to run
6 away from you. What you are doing now, you are
7 taking my argumentative agreement for the facts.
8 My argument is they supposedly knew all about this.
9 The fact closest, we come to the facts right now,
10 without an evidentiary hearing, Murelo was told by his
11 attorney there was a deal, but communications somehow
12 broke down, and that end part of the deal was
13 communicated. The real vice to the system has got
14 nothing to do with what we are talking about. The
15 state courts failed to follow the salubrious rule of
16 federal rule of civil procedure, statute 11.

17 Your Honor, thou shalt not --

18 THE COURT: I know. But we don't adopt rules
19 for the state courts.

20 MR. FARRELL: Except when those rules deal
21 with fundamental fairness. I am not going to do that
22 now. I am going to try to expand the argument saying
23 that 11 and 14, it wasn't a bad idea, but I don't
24 think we are prepared in this case for either thee or
25 me to go that way. When you deal with the fairness

1
2 of dealing with a judge, if there's going to be any
3 mistake, mistake should be in favor of the defendant,
4 not in favor of the judge.

5 THE COURT: Well, in other words, you are
6 asking me to invoke the standards of criminal
7 justice.

8 MR. FARRELL: Which I rely on quite heavily
9 in the brief, as you know.

10 THE COURT: I'm not sure that the law of New
11 York yet --

12 MR. FARRELL: For this case. I am through with
13 the law of New York, I hope.

14 Thank you.

15 THE COURT: I will take it under consideration.

16 MR. FARRELL: The stay, of course, is
17 continued.

18 Thank you, your Honor.

19 MR. BIRCH: Thank you, your Honor.

20 (Whereupon, these proceedings were concluded.)
21
22
23
24
25

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----- X

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs-Respondents,

-against-

MICHAEL J. MURELLO,

Defendant-Appellant.

----- X

RESPONDENTS' BRIEF

PRELIMINARY STATEMENT

This is an appeal from two judgments of the Supreme Court, Kings County, rendered January 29, 1973, convicting appellant (upon his guilty pleas) of the crime of Unlawful Possession of Untaxed Cigarettes for Sale Purposes, and sentencing him to two one-year terms, to run consecutively (Titone, J., at plea and sentence).

STATEMENT OF FACTS

On January 29, 1973, defendant withdrew his pleas of not guilty to two indictments (numbers 8037/1972 and 10528/1972) for possession of untaxed cigarettes as a felony. In pleading to misdemeanor possession on each indictment, defendant received from Mr. Justice Titone a promise that if he, the defendant, was not arrested between January 29, 1973 and the day scheduled for sentencing, May 18, 1973, the defendant would receive only probation and a fine and would not be incarcerated. The court took this lenient action despite the fact that the People, in accepting the lesser charge, recommended that the defendant be sentenced to

"the full maximum sentence that can be imposed upon this individual by law in reference to incarceration of this defendant." (See minutes of plea, Ind. No. 8037/1972, Jan 29, 1972, p.1, and minutes of plea, Ind. No. 10528/1972, Jan. 29, 1972, p.3).

Defendant, through his counsel, wholeheartedly embraced the court's promise (Appellant's Appendix, pp. A15-A16).

Defendant was arrested in the interim on another charge of unlawful possession of untaxed cigarettes. Having thus failed to meet the conditions set by the judge, defendant attempted to withdraw his plea. However, the court felt constrained to follow through on its promise (just as it would have, had the defendant not been arrested), and sentenced him to two one-year prison terms.

Defendant, presently on bail pending this appeal, appeals

from the judgments of conviction.

POINT I

IN REFUSING TO ALLOW WITHDRAWAL OF DEFENDANT'S PLEAS OF GUILTY, THE COURT ACTED IN A MANNER ENTIRELY CONSISTENT WITH ITS SENTENCE PROMISE.

As counsel for appellant noted in his opening sentence of argument,

"it is clear that the defendant had been promised probation and fine by the court itself, provided that Murello not be arrested before sentencing." (Appellant's Brief, p.5.)

The People concur and find Justice Titone's language conclusive on this point:

"When I took the plea, I took it, and I stated on the record, if there were any subsequent arrests, that there would be no probationary period." (Sentencing Minutes, May 18, 1973, p.4.)

Furthermore, it is entirely clear from the record that counsel for defendant understood and accepted the provisions of the sentence promise. Spoke the counsel:

"Judge, I understand that at the time of plea, that your Honor did offer probation of --- a fine and possible probation if there was no subsequent arrest during the interim period, and of course, we agreed to that." (Sentencing Minutes, May 18, 1973, pp. 2-3; emphasis added.)

Defendant was in fact arrested during the interim (interestingly, though not significantly for this discussion, on the same charge as those to which he pleaded guilty).

Consequently, it is unarguable fact that the Court clearly stated its promise, that defense counsel understood it and accepted it, that its conditions were met, and that the court fulfilled its promise. Thus, defendant has no basis whatsoever

in demanding that he be allowed to withdraw his plea.

Nonetheless, defendant makes just such a demand, relying almost exclusively on People v. Selikoff, 41 A D 2d 376 (1973).

In his brief, appellant argues that the lower court in Selikoff made a promise of no incarceration and that "this court read in a condition subsequent to the promise" (Appellant's Brief, p.6). However, this court did no such thing.

Rather, the court held that where a judge fails to keep his sentence promise, the defendant, while not being able to demand specific performance, should be allowed to withdraw his plea. The lower court included no provisos or conditions subsequent in its promise. Specifically, the lower court stated:

"I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representations made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises."

However, during the period between pleading and sentencing, additional information concerning Selikoff's involvement came to the court's attention. On the basis of this information, and not based upon any subsequent trouble involving Selikoff, the judge made inoperable his previous promise. Thus, even if we were to assume arguendo that the judge in our case at bar

also revoked his promise, it was based upon the subsequent trouble that appellant found himself in, and not information that was available to the judge at the time of receipt of the plea (as was the case in Selikoff).

Counsel for appellant makes the further argument that the "no-arrest" stipulation "placed an impossible burden upon the defendant," (Appellant's Brief, p.5), and, presumably, should be thus ignored. Even if, for the sake of argument, we were to assume that the burden was impossible, counsel fully understood and agreed to the promise as presented by the court.

But of greater import is the absurdity that the underlying no-arrest proviso constituted an impossible burden. The court made the sentence promise when the defendant submitted his plea on January 29, 1973. Sentencing was scheduled for May 18, 1973.

Millions of people spend an entire lifetime without being arrested. Is three and one-half months an inordinate length of time to exist without being arrested? The People submit that it is not and that the stipulation included in the promise was not only "possible," but reasonable.

POINT II

A HEARING ON THE ARREST IS UNNECESSARY TO DETERMINE ITS
FACTUAL JUSTIFICATION.

None of the cases cited by defense counsel in his brief go to the question of instituting a hearing to determine the reasonableness of a judge's sentence promise. Though defense counsel is totally unable to support his assertion, the People do not desire that this defendant be unjustly incarcerated.

However, the People feel that the time and expense that would go into conducting a hearing is unnecessary. Rather, we propose that an updated probation report be submitted focusing on defendant's activities from January 29, 1973 (the date of the plea), until June 29, 1973 (the date of sentencing).

CONCLUSION

FOR THE ABOVE ENUMERATED REASONS, THE JUDGMENT OF THE
COURT BELOW SHOULD BE AFFIRMED.

Dated: Brooklyn, New York
September, 1974

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

JAMES STEINBERG
Criminal Law Investigator

COURT OF APPEALS OF THE STATE OF NEW YORK

-----X

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs - Respondents,

-against-

MICHAEL MURELLO,

Defendant-Appellant.

-----X

RESPONDENTS' BRIEF

JAMES A. STEINBERG
Assistant District Attorney
On the Brief.

Eugene Gold
District Attorney
Kings County

COURT OF APPEALS OF THE STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

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RESPONDENTS' BRIEF

JAMES A. STEINBERG
Assistant District Attorney
On the Brief.

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COURT OF APPEALS OF THE STATE OF NEW YORK

-----X

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs - Respondents,

-against-

MICHAEL MURELLO,

Defendant-Appellant.

-----X

RESPONDENTS' BRIEF

Preliminary Statement

This is an appeal pursuant to leave granted by Honorable Sol Wachtler, associate Judge of this Court, from an order of the Appellate Division, Second Department, entered January 6, 1975, unanimously affirming, without opinion, two judgments of the Supreme Court, Kings County, convicting appellant (upon his pleas of guilty) of the crime of Unlawful Possession of Untaxed Cigarettes for Sale Purposes, and sentencing him to two one-year terms of imprisonment, such sentences to run consecutively (Titone, J. at plea and sentence).

Statement of Facts

On January 29, 1973, defendant withdrew his pleas of not guilty to two indictments (Kings County numbers 8037/1972 and 10528/1972) for possession of untaxed cigarettes as a felony. In pleading to misdemeanor possession on each indictment, the defendant received from Mr. Justice Titone a promise, the precise wording of which does not appear in the record, that if he, the defendant, was not arrested and stayed out of trouble between January 29, 1973 and the day scheduled for sentencing, May 18, 1973, the defendant would receive only probation and a fine and would not be incarcerated. The court took this lenient action despite the fact that the People, in accepting the lesser charge, recommended that the defendant be sentenced to

"the full maximum sentence that can be imposed upon this individual by law in reference to incarceration of this defendant." (P 2, PP 3).*

Defendant, through his counsel, wholeheartedly embraced the court's promise (S3).**

*Pagination preceded by "P" and "PP" refers to transcription of the minutes of plea, January 29, 1973, to Indictments 8037/72 and 10528/72 respectively.

**Pagination preceded by "S" and "SS" refers to transcription of the minutes of sentence, May 18, 1973 and June 29, 1973 respectively.

On April 26, 1973, in the interim between plea and sentence, defendant was arrested on another charge of unlawful possession of untaxed cigarettes. This fact was presented to the court at sentencing on May 18, 1973, at which time defendant requested an adjournment. On May 29, 1973, an indictment was handed up on the April charges. One month later, on June 29, 1973, having failed to meet the conditions set by the judge, defendant attempted to withdraw his plea prior to sentence. However, the court felt constrained to follow through on its promise and sentenced him to two one-year prison terms.

Defendant, presently on bail pending this appeal, appeals from the affirmance of the Appellate Division, Second Department.

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POINT I

THE LOWER COURT ACTED CORRECTLY IN REFUSING TO ALLOW APPELLANT TO WITHDRAW HIS PLEA INASMUCH AS THE SENTENCE PROMISE WAS KEPT. FURTHER, THE PROMISE WAS PROPER.

A. The sentence promise was kept.

In his brief, appellant presents the following question for this court's consideration: Whether the court below erred in refusing to allow the defendant to withdraw his plea since "the promised disposition could not be made" in that "the defendant had originally been promised probation." (Appellant's Brief, p.2, "Question Presented"). In truth, the promised disposition was fully kept and the defendant was clearly not given an unqualified promise of probation.

The specifics of the promise cannot be determined in that there is no indication of the promise in the minutes of the plea. That there was a sentence promise made at plea is not doubted. The minutes of sentence amply allude to the promise. And though there are some internal inconsistencies as to the precise wording of the promise, (discussed, infra), there is absolutely no question but that 1) the judge expressly conditioned the promise (S 2-4, SS2-SS7); 2) the defendant had time to consider the court's proposal (P5); 3) the defendant discussed the proposal with his counsel (P3); and 4) the defendant knowingly, voluntarily, and without coercion embraced the court's proposition (S 2-3).

It has long been established that permission to withdraw a plea of guilty is a subject that falls within the sound discretion of the trial court. People v. Dixon, 29 N.Y. 2d 55 (1971); People v. Garrett, 43 A.D. 2d 503 (4th Dept. 1974); People v. Borge 40 A.D.2d. 552 (2d Dept. 1972); United States v. Simmons, 497 F. 2d 177 (5th Cir. 1974); United States v. Denniston, 89 F. 2d 646 (2d Cir. 1937). cert. denied, sub nom. Denniston v. United States, 30 U.S. 709. This has also long been codified in New York by statute (formerly the Code of Criminal Procedure, Section 337, and currently Section 220.60(3) of the Criminal Procedure Law.

Thus, for appellant to validly assert that this court should reverse the judgment below because he was not allowed to withdraw his guilty plea, he must be able to show that the lower court abused its discretion. There is not one single case that holds that a judge abuses his discretion when he fails to allow the defendant to withdraw his plea, where the defendant has knowingly, voluntarily, and after consultation with counsel, pled guilty. Indeed, this court has held that a defendant should not be able to knowingly and voluntarily plead guilty and then later repudiate the plea. People v. Nicholson, 11 N.Y. 2d 1067 (1962). See also People v. Coles, 34 A.D. 2d 1051 (3rd Dept. 1970).

In People v. Etheridge, 29 A.D. 2d 679 (2d Dept. 1968), the court held that the trial judge below had not abused his discretion in refusing to allow the defendant to withdraw his plea since it was given voluntarily, upon the unhurried advice of counsel, and where the defendant admitted the factual basis for the plea. All of those factors were also present here.

The same result was reached in People v. Laskaris, 28 A.D. 2d 586 (3rd Dept. 1967) where there was no claim of fraud, coercion, mistake, or innocence of the crime pled to, and in People v. Garrett, supra, where the presence of counsel and the defendant's knowledge were considered crucial. The People respectfully submit that these same considerations lead to the conclusion that there was no abuse of discretion here.

Federal courts have also endorsed the principle that the presence of counsel and the voluntariness and cognizance of the plea and its effect are determinative of proper judicial conduct where permission to withdraw has been denied. (See inter alia, McMann v. Richardson, 397 U.S. 759 (1970) and United States ex rel Phelan v. Brierly, 453 F. 2d 73 (3rd Cir. 1971)).

In the case at bar, the minutes of plea reflect that the court completely and scrupulously advised appellant as to his full panoply of rights. Appellant heard his rights twice, once for each indictment. Defense counsel was alongside appellant at all times during

the course of the proceedings. Appellant indicated that he had had ample time to consider his plea (P5). At the first date for sentencing, defense counsel clearly indicated his own role in the decision-making process and his client's acceptance of the court's proposal:

"Mr. Darienzo: Judge, I understand at that the time of plea, that your Honor did offer probation of -- a fine and possible probation if there was no subsequent arrest during the interim period, and of course, we agreed to that." (S2-3)
(emphasis supplied)

The People respectfully submit that the assistance of counsel and the voluntariness of the plea are readily apparent. That which appellant now seeks to undo, he had earlier knowingly and thankfully embraced.

Appellant's entire argument is grounded on the faulty foundation that the sentence promise was broken. He quotes at length from proposals of the American Law Institute and the American Bar Association. But contained even within those sections quoted by appellant are the following guidelines for plea withdrawal:

Where the trial judge "later decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement..."*

*Appellant's Brief, p.7, citing the "Responsibilities of the Trial Judge" in the ABA Project on Minimum Standards for Criminal Justice relating to pleas of guilty.

Where the judge "determines not to grant the charge or sentence concessions contemplated by the agreement."**

Where the judge "later changes his mind..."***

And where the judge "decides (he) cannot sentence the defendant in accordance with the agreement."****

These guidelines are of course inapplicable to our situation because the promise was kept.

Appellant's primary focus is directed toward the case of People v. Selikoff, 35 N.Y. 2d 227 (1974). However, Selikoff, too, deals with a situation where the sentence promise was broken. The court specifically promised Selikoff the opportunity to withdraw his plea. Selikoff, however, demanded specific performance of the promise. The trial court refused to accede to the demand, and this court affirmed that action.

We respectfully submit that upon any reading of Selikoff, no matter how strained, that case does not deal with the obligatory propriety of granting plea withdrawals, the relief that appellant herein is requesting. It does not concern a situation where the promise was fulfilled. Consequently, appellant's reliance on Selikoff is misplaced.

**Appellant's Brief, p.8, citing the "Role of the Judge in Plea Discussions and Plea Agreements", in the ABA Project mentioned above.

***Appellant's Brief, p18, citing amendments to an ABA Project.

****Appellant's Brief, p.9, citing provisions of the American Law Institute Model Code of Pre-Arrest Procedure (1972).

We contend that the case at bar is more properly guided by People v. Ryan, 132 NYS 2d 283 (Kings County Court, 1954) and People v. Chadwick, 33 A.D. 2d 687 (2d Dept. 1969).

In Ryan the defendant interpreted the court's promise to give him a "deferred sentence" as being akin to promising him that he would not be sentenced at all. In ruling against the defendant, the court distinguished People v. Sullivan, 276 A.D. 1087 by stating:

"There the promise made by the Court to the defendant was not kept. In this case, every promise made to the defendant was religiously kept." 132 NYS at 284.

In People v. Chadwick, 33 A.D. 2d 687 (2d Dept. 1969), the court held that when the conditioned sentence promise was in effect kept, the defendant was not entitled to withdraw his plea. In denying defendant's application for a hearing on his motion, (as opposed to appellant herein who does not even make this intermediate request for a hearing), the court held that even if the sentence promise was made as claimed by defendant:

"the relief to which defendant would be entitled is not withdrawal of his plea with the option to either stand trial or plead anew, but fulfillment of the promise."
33A.D. 2d at 688.

Appellant takes the position that he should, as a matter of right, be entitled to withdraw his plea. He does not request a hearing to determine whether his subsequent arrest did in fact violate the spirit of the judge's warning to stay out of trouble. Nevertheless, we herein respectfully submit that a hearing is not required.

This court held, in People v. Tinsley, 35 N.Y. 2d 926 (1974), that "only in the rare instance will a defendant be entitled to an evidentiary hearing" on a motion to withdraw a plea of guilty. Two facts in the instant case establish that a hearing is not required.

First, as noted above, it is clear that the promise was fulfilled. Second, the court was aware of factors beyond the fact of the defendant's arrest that further supported its belief that the defendant had engaged in conduct violative of the court's instructions.

At the original sentence hearing, the court was informed that the interim arrest was again based on untaxed cigarettes (S3), the very charge that was the basis of the two indictments that are the subject of this appeal. Defense counsel requested an adjournment for sentence. In the intervening time, the defendant was indicted on the subsequent charges. The judge was aware of this fact.(SS 2). Consequently, there was ample reason for the court to believe that the defendant was not eligible for probation under the plea bargain the defendant had obtained.

B. The sentence promise was proper.

Though no mention of the propriety of the sentence promise appears in appellant's brief, we feel compelled to discuss it.

First, we note again that the precise wording of the promise does not appear in the minutes of the plea. However, there are five references to the promise in the minutes of sentence.

The first reference, quoted supra at p.7, was an endorsement by defense counsel of the court's promise of probation "if there was no subsequent arrest" (S2-3). The next reference was made shortly thereafter by the judge. He, too, referred to "arrests": "if there were any subsequent arrests that there would be no probationary period" (S4).

The last three allusions to the promise, though, do not refer to "arrests" as the criterion for the sentence. Rather, defense counsel made the following statement:

"I believe there was a promise of probation and a fine, and...I believe that your Honor stated if there was no other trouble up to the time of sentence. Unfortunately, there was an arrest up to the time of sentence" (SS2-3) (emphasis supplied).

This appears to specifically indicate that there was not a "no arrest" proviso, but rather an instruction to stay out of trouble.

This is underscored by the judge who stated:

"I took a plea. I promised him probation if he wouldn't get in trouble" (SS 7).

And it is further supported by defense counsel:

"Sometimes, Judge, it's not difficult to get into trouble" (SS 8)

Consequently, it appears that the court promised appellant that he would not be sentenced to jail if he stayed out of trouble. When the judge was informed that the arrest was again for untaxed cigarettes, and when, at the second sentence date, he was told that an indictment was handed up on the latter case, the court acted well within its sound discretion in sentencing the defendant to jail. Additionally, though the District Attorney does not have access to it, presumably the pre-sentence report (which the judge was required to have by statute, CPL Section 390.20) contained reference to the facts of the subsequent arrest.

But even if the lower court did condition its promise on a subsequent arrest, rather than merely admonish defendant to stay out of trouble, that promise would still be proper for at least three reasons. First, the defendant, with the advise of counsel, knowingly and voluntarily agreed to the conditions. If he had an objection to it, the time to have voiced it was at the plea, and not after having taken advantage of the lenient aspects of the promise.

Second, by the time sentence was imposed, the record clearly reveals that the judge knew that appellant's arrest was again for untaxed cigarettes and that he had been indicted. Thus, even if the promise was conditioned upon an interim arrest, the judge was aware of factors in addition to and related to the arrest.

Third, the legislature has given the broadest possible discretion to a judge in his consideration of a proper sentence. Section 390.30 of the CPL delineates such factors as the defendant's "social history, employment history, family situation, economic status, education, and personal habits" as appropriate elements to consider. Surely, an arrest that occurs during the short interim between plea and sentence is at least as relevant as a person's economic status or personal habits.

The instant situation is not unlike that of setting parole conditions in which avoiding arrest is an oft-used condition. In the case of People v. Denna, 40 Misc. 2d 717 (New York Co. 1963), the court held that even if the subsequent arrest was illegal due to a faulty search and seizure, the revocation of parole was proper:

"Whether the federal arrest was or was not bottomed upon an illegal search and seizure is of no moment in this proceeding. For the information of that arrest imparted to the parole officer was not used or to be used by them to convict him of a crime." 40 Misc. 2d at 720

(In accord is People ex rel Oddo v. Fay, 16 A.D. 2d 932 (2d Dept. 1962), aff'd 13 N.Y. 2d 762 (1963). To similar effect is People ex rel. Ellington v. Zelker, 39 A.D. 2d 757 (2d Dept. 1972), where it was held that the commission of a crime is adequate, "in and of itself," to support parole revocation.)

In conclusion, the People respectfully contend that Appellant's arrest for possession of the cigarettes violated the spirit and substance of the judge's instructions. Completely scorning the court's good-faith proposal, appellant chose to continue to deal in large quantities of untaxed cigarettes. But, as with all acts of criminality, the actor takes a chance that the scheme may go awry. Appellant took his chance and lost. His sentence was proper and should not now be set aside.

CONCLUSION

FOR THE AFOREMENTIONED REASONS. THE JUDGMENT BELOW SHOULD
BE AFFIRMED.

Dated: June, 1975
Brooklyn, New York

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

JAMES A. STEINBERG
Assistant District Attorney
of Counsel.

Farrell

To Be Argued By:

RICHARD T. FARRELL

Time Requested: 15 min.

SUPREME COURT : STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

-against-

MICHAEL J. MURELLO,

Defendant-Appellant.

(Kings County Indictment Nos. 8037/72, 10528/72)

BRIEF FOR APPELLANT

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STATEMENT PURSUANT TO C. P. L. R. 5531

1. The index numbers of these cases in the Court below were:
 - a. Kings County Indictment No. 8037
 - b. Kings County Indictment No. 10528.
2. The full names of the parties are:
 - a. Indictment No. 8037
The People, etc. v. Michael J. Murello
There has been no change in the parties.
 - b. Indictment No. 10528
The People, etc. v. Frank Dello Russo
and Michael J. Murello.
Frank Dello Russo is not a party to this appeal.
3. Both prosecutions were commenced in the Supreme Court, Kings County.
4. Defendant-Appellant was arraigned on Indictment No. 8037 on September 21, 1972; On Indictment No. 10528 on December 18, 1972.
5. Both Indictments charged Defendant-Appellant with possession of untaxed cigarettes as a felony.
6. This is an appeal from judgments of conviction, following substituted pleas of guilty, for misdemeanor possession of untaxed cigarettes. Both judgments were entered on June 29, 1973.

7. The Appendix method is being used.

STATEMENT PURSUANT TO RULE 670.17 (e) (2)

An order pursuant to C.P.L. 460.50 dated July 31, 1973, admitting defendant to bail (\$2,500. on each indictment), issued by Mr. Justice Barshay is outstanding.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND JUDICIAL DEPARTMENT
-----X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

-against-

MICHAEL J. MURELLO,

Defendant-Appellant.

-----X

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND JUDICIAL DEPARTMENT
-----X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

-against-

MICHAEL MURELLO,

Defendant-Appellant.

-----X

APPELLANT'S BRIEF

STATEMENT

Defendant appeals from two judgments (Ind. Nos. 10528/72, 8037/72 - Kings County) of the Supreme Court, Kings County (Titone, J.), A4-A12 sentencing him to consecutive one year sentences upon his plea of guilty. Before imposing sentence, the court below denied defendant's application to withdraw his plea of guilty (6, 16). Sentence was imposed on June 29, 1973.

FACTS

Defendant had been twice indicted (Ind. Nos. 10528 and 8037) for possession of untaxed cigarettes as a felony. On January 29th, 1973, Mr. Justice Titone permitted the defendant to withdraw his earlier pleas of not guilty and plead guilty to misdemeanor possession on each indictment. (17-22, 28-32). After accepting the plea on each indictment,

*Unless otherwise indicated, numbers in parenthesis refer to pages in the Appendix

Justice Titone proceeded to catechize the defendant, asking, inter alia, "Have any threats or promises been made to you by the District Attorney, any officer of the court, or the court itself?" (20,31) The defendant answered in the negative. (21,31)

On May 18th, 1973, Murello appeared before Mr. Justice Titone for sentencing. At that time counsel moved to withdraw the pleas entered on January 29, 1973 (14-16). It seems that when the guilty pleas were taken there had in fact been a promise by Mr. Justice Titone to sentence the defendant to probation and to impose a fine, and not to incarcerate the defendant, provided that the defendant not be arrested before the imposition of sentence (14-15, 16). As it appears, defendant was in fact arrested sometime between January 29th and May 18th (15). During the proceedings on May 18th, counsel asked the court to disregard the fact of the mesne arrest and "still consider placing him on probation with a fine." (15-16) The court responded: "This man is not probation material. I'm not going to allow him to withdraw his plea." (16) Counsel thereupon informed the court that the defendant wished to withdraw his pleas, and the court replied: "When I took the plea, I took it, and I stated on the record, if there were any subsequent arrests, that there would be no probationary period, he still gets a misdemeanor. I'm not going to allow him to withdraw his plea. Is he ready for sentencing, or does he want an adjournment for sentencing?" (16). The matter

was adjourned.

It must be noted that the defendant informed the court that he was innocent of the charges (similar to those that were the subject of the indictments and pleas. In Murello's own words: "This time, your Honor, it's a fact."

(15) Nowhere in the minutes of January 29, 1973, does any reference appear to a promised disposition in return for the pleas taken (17-32). From the remarks both of Mr. Justice Titone (6, 10, 16) and Murello's counsel (5, 14-15), there is no room for doubt that such a promise had, in fact, been made, notwithstanding defendant's replies to the court's questions during the plea proceedings (20-21, 31).

On June 29th, 1973, Murello appeared before Mr. Justice Titone for sentencing. Counsel renewed the application to withdraw the guilty pleas (6). That was denied again (6). During the colloquy before imposition of sentence, counsel reminded Mr. Justice Titone that the arrest was merely an accusation and prayed for leniency (8). The court imposed consecutive one year sentences, and topped off the proceedings with the following: "I took a plea. I promised him Probation if he wouldn't get in trouble. They don't deserve chances after that...." (10-11)

Defendant, presently on bail pending this appeal, appeals from the judgments of conviction.

QUESTIONS PRESENTED

1. Whether the court below properly refused to permit the defendant to withdraw his plea of guilty when it appeared that the promised disposition could not be made because of intervening circumstances.

The court below refused to permit withdrawal of a plea of guilty and imposed a sentence of imprisonment, although, the defendant had originally been promised probation.

2. Whether defendant is entitled to a hearing on the asserted grounds for the court's abandoning it's promise.

No such hearing was held.

POINT I

THE COURT BELOW IMPROPERLY
REFUSED TO ALLOW WITHDRAWAL
OF DEFENDANT'S PLEAS OF GUILTY.

From the preceding statement of facts it is clear that the defendant had been promised probation and fine by the court itself, provided that Murello not be arrested before sentencing. It is our position that the promise underlying the plea placed an impossible burden upon the defendant, and the denial of leave to withdraw the pleas of guilty was improper under the controlling decision of this court, People v. Selikoff, 41 A.D. 2d 376.

Consider the first proposition-- the impossibility of Murello's complying with the requirement that he not be arrested. The world knows that arrest can be the product of mistake or malice by the police, as well as the expectable result of criminal conduct. But, Mr. Justice Titone was not interested in the circumstances surrounding Murello's arrest, nor was he interested in exploring Murello's claim that he had done nothing. Rather, the court below imposed sentence violative of the promise of probation and fine because the court learned that Murello had been accused of another similar crime. It would be unconscionable to hold any defendant to a bargain that no mortal could be expected to keep--unless there is some way a citizen can assure that he will never be the subject to the possible mistakes, or worse, of the police.

When a sentence promise has been made, and the court believes itself unable, or is unwilling to carry through with the deal, the defendant is, at the least, entitled to the opportunity to withdraw the plea. People v. Selikoff, 41 A.D. 2d 375, cf. Santobello v. New York, 404 U.S. 257: People v. Craig, 41 A.D. 2d 932; see also People v. Chadwick, 33 A.D. 2d 687.

The outcome of the appeal herein is dictated by the recent decision of this court in People v. Selikoff, supra. In Selikoff the trial court made a promise that it would not impose a prison sentence. Between plea and sentence the court uncovered information indicating that it could not "in good conscience" honor the promise. The judge offered the defendant the option of withdrawing the plea and returning to the status quo ante. When the defendant insisted upon "specific performance" of the promise, the court imposed a jail term. This court affirmed, holding that all the defendant was entitled to was the opportunity to withdraw the plea.

If a promise made by the court cannot be enforced when it subsequently appears that the defendant is not entitled to the disposition originally promised by the court, then Mr. Justice Titone erred when he denied the application to withdraw the pleas in this case. Consider the following:

In Selikoff, there was a promise of no incarceration, and this court read in a condition subsequent to the promise.

In the present case, there was a promise of no incarceration, subject to an express, (albeit impossible) condition subsequent.

In both cases the trial judges were faced with facts, discovered or arising post-lea.

In Selikoff the court properly offered the defendant the opportunity to withdraw his plea. In the present case the court improperly refused to grant the defendant's request to withdraw his plea.

People v. Selikoff, 41 A.D. 2d 376, requires that the plea of guilty and the judgments appealed from be vacated, the plea of not guilty reinstated and the matter remanded further proceedings on the original indictments.

POINT II

DEFENDANT IS ENTITLED, IN THE ALTERNATIVE, TO A HEARING ON THE QUESTION WHETHER THE "ARREST" THAT LED TO THE IMPOSITION OF A TERM OF IMPRISONMENT INSTEAD OF THE PROMISED PROBATION WAS FACTUALLY JUSTIFIED.

If this court be of the opinion that this case is not governed by the decision in Selikoff (see Point I), then defendant is at least entitled to a remand for a hearing on the question whether the so-called "arrest" occurred under circumstances justifying the trial court in reneging on the promise of probation and fine.

Since the sentencing court placed so much reliance on the fact of "arrest" (apparently because it demonstrated that defendant was undeserving of probation); and since the defendnat, who has not claimed innocence of the charges by the pleas, had informed the court that the arrest was unfounded, the sentencing court should have, at the minimum, conducted a hearing on the factual underpinning of the "arrest", before imposing a jail sentence because of the arrest. Cf. People v. King, 32 N.Y. 2d 697, (necessity of a hearing so that plea court can make "an informed determination"); People v. McKennion, 27 N.Y. 2d 671; People v. Klein, 29 A.D. 2d 774.

The ordering of a hearing on the question of the "arrest" would be no empty gesture. A determined time that the arrest was not founded on any misdeed of the defendant would remove the single impediment perceived by Mr. Justice Titone, and take this case out of the ruling in People v. Selikoff, 41 A.D. 2d 376.

Accepting for the purpose of this part of the argument only the idea that a term of the agreement between the court and the defendant that the defendant not be arrested for a crime, a finding that there was no basis for the arrest would seem to entitle defendant to specific performance of the promise. Santobello v. New York, 404 U.S. 257, 262; People v. Smith, 33 A.D. 2d 688; People v. Smith, 34 A.D. 2d 621.

A defendant who has pleaded guilty and who upon sentence informs the court that he is not guilty is entitled, except in extraordinary circumstances either to withdraw his plea or to a hearing on the merit of his claim, People v. McKennion, 27 N.Y. 2d 671. In this case, where the defendant claims that he is not guilty of the charge that has led the court to renege on its promise, there should be a hearing on the merit of this claim.

CONCLUSION

FOR THE ABOVE REASONS, THE JUDGMENTS
APPEALED FROM MUST BE VACATED AND THE
MATTER REMANDED FOR FURTHER PROCEEDINGS.

Respectfully submitted,

RICHARD T. FARRELL

Court of Appeals

State of New York.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

against

MICHAEL J. MURELLO,
Defendant-Appellant.

(Kings County Indictment Nos. 8037/72, 10528/72.)

APPELLANT'S BRIEF

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COURT OF APPEALS - STATE OF NEW YORK

-----X
THE PEOPLE OF THE STATE OF NEW YORK

Respondents,

-against-

MICHAEL MURELLO,

Defendant-Appellant.
-----X

APPELLANT'S BRIEF
STATEMENT

Defendant appeals, pursuant to leave granted by Judge Wachtler (Add'l papers, ii) from an order of the Appellate Division, Second Department (Add'l papers, iii) unanimously affirming, without opinion, two judgments of the Supreme Court, Kings County (Titone, J.) convicting defendant-appellant, upon his pleas of guilty, of the misdemeanor of possession of untaxed cigarettes for sale purposes and sentencing defendant to consecutive one year sentences (A10-A11).^{*} Before sentence was imposed, the trial court denied defendant's application to withdraw the guilty pleas.

FACTS

Defendant had been twice indicted (Ind. Nos. 10528 and 8037) for possession of untaxed cigarettes as a felony. On January 29th, 1973, Mr. Justice Titone permitted the defendant to withdraw his earlier pleas of not guilty and plead guilty to misdemeanor possession on each indictment. (A19-23, 29-33). After accepting the plea on each indictment, Justice Titone proceeded to catechize the

^{*}Unless otherwise indicated, numbers in parentheses refer to pages in the Appendix

the defendant, asking, inter alia, "Have any threats or promises been made to you by the District Attorney, any officer of the court, or the Court itself?" (A21,31) The defendant answered in the negative. (A22,31)

On May 18th, 1973, Murello appeared before Mr. Justice Titone for sentencing. At that time counsel moved to withdraw the pleas entered on January 29, 1973 (A15-17). It seems that when the guilty pleas were taken there had in fact been a promise by Mr. Justice Titone to sentence the defendant to probation and to impose a fine, and not to incarcerate the defendant, provided that the defendant not be arrested before the imposition of sentence (A15-17). As it appears, defendant was in fact arrested sometime between January 29th and May 18th (A16). During the proceedings on May 18th, counsel asked the court to disregard the fact of the mesne arrest and "still consider placing him on probation with a fine." (A16-17) The court responded: "This man is not probation material. I'm not going to allow him to withdraw his plea." (A17) Counsel thereupon informed the court that the defendant wished to withdraw his pleas, and the court replied: "When I took the plea, I took it, and I stated on the record, if there were any subsequent arrests, that there would be no probationary period, he still gets a misdemeanor. I'm not going to allow him to withdraw his plea. Is he ready for sentencing, or does he want an adjournment for sentencing?" (A17). The matter was adjourned.

It must be noted that the defendant informed the court that he was innocent of the charges (similar to those that were the subject of the indictments and pleas). In Murello's own words: "This time,

your Honor, it's a fact." (A16) Nowhere in the minutes of January 29, 1973, does any reference appear to a promised disposition in return for the pleas taken (A18-33). From the remarks both of Mr. Justice Titone (A7, 11,17) and Murello's counsel (A6-7, 15-16), there is no room for doubt that such a promise had, in fact, been made, notwithstanding defendant's replies to the court's questions during the plea proceedings (A21-22, 32).

On June 29th, 1973, Murello appeared before Mr. Justice Titone for sentencing. Counsel renewed the application to withdraw the guilty pleas (A7). That was denied again (A7). During the colloquy before imposition of sentence, counsel reminded Mr. Justice Titone that the other matter was merely an accusation and prayed for leniency (A9). The court imposed consecutive one year sentences, and topped off the proceedings with the following: "I took a plea. I promised him Probation if he wouldn't get in trouble. They don't deserve chances after that...." (A11-12)

Defendant appeals from the order of the Appellate Division affirming the above conviction

QUESTION PRESENTED

Whether the court below properly refused to permit the defendant to withdraw his plea of guilty when it appeared that the promised disposition could not be made because of intervening circumstances.

The court below refused to permit withdrawal of a plea of guilty and imposed a sentence of imprisonment, although the defendant had originally been promised probation.

Point I

THE COURTS BELOW IMPROPERLY REFUSED TO GRANT DEFENDANT'S TIMELY APPLICATION TO WITHDRAW THE PLEA OF GUILTY.

The record in this case amply demonstrates that the trial judge himself had promised Murello probation and fine in exchange for Murello's pleas of guilty (A17,6-7,11). The People conceded that much in the Appellate Division (Respt's App. Div. Brief, pp. 2,4). Because events intervening between the taking of the plea, to wit, Murello's arrest and indictment on a charge similar to those on which the plea bargain was based, the trial judge informed Murello that the deal was off (A17). Well, almost off. Judge Titone denied Murello's repeated applications to withdraw the guilty plea (A7,15) and sentenced Murello to consecutive one year sentences (A10-11).

Reversal is required here because of the decision in People v. Selikoff (35 NY2d 227); because of the teaching of both the American Bar Association (American Bar Association Projection Minimum Standards For Criminal Justice, Standards Relating to Pleas of Guilty, §§2.1(a)(ii)(5); 3.3. [b] and Standards Relating to the Function of the Trial Judge §4.1(c)(iii) [1968]) and the American Law Institute (American Law Institute Model Code of Pre-Arraignment Procedure, §350.6 [Tent. Draft No. 5, 1972]); and the great weight of authority elsewhere.

First, the Selikoff reason for reversal in this case.

In Selikoff the trial judge originally made a promise that

he would not impose a prison sentence upon the guilty-pleading defendant. But between plea and sentence, the trial judge uncovered information indicating that he could not "in good conscience" honor the promises. The trial judge offered Selikoff the opportunity to withdraw the plea and return to the status quo ante. When Selikoff insisted upon "specific performance" of the promise, he received a jail term instead. Both the Appellate Division (41 AD2d 375) and this Court (35 NY2d 227) affirmed.

Chief Judge Breitel, in Selikoff made the following observations: "The promise must be fulfilled provided there is nothing contained in the pre-sentence report or in later learned facts rendering improvident the sentence promised...." (35 NY2d at 240 emphasis added). "...any sentence 'promise' at the time of pleas is, as a matter of law and strong public policy, conditioned upon its being lawful and appropriate in light of the subsequent presentence report or information obtained from other reliable sources" (35 NY2d at 238 emphasis added). "... a guilty plea induced by an unfulfilled promise either must be vacated or the promise honored (Santobello v. New York, 404 U.S. 257, 260...) " (35 NY2d at 241). "Defendant Selikoff was afforded an opportunity to withdraw his plea of guilty. This opportunity he was entitled to receive since the foundation for the plea, regardless of fault, had proven to be without substance" (35 NY2d at 239).

In light of the foregoing language from the Selikoff opinion, the following rule appears to be the law in New York:

If the trial judge promises a certain disposition in exchange for the defendant's plea of guilty, and it later develops that the court

cannot properly keep the promise, then the Court must allow the defendant to withdraw the guilty plea. If the defendant declines to withdraw the plea, then, and only then, may the sentencing court properly proceed to impose a punishment other than that originally promised.

Application of the above principles to this case requires that the matter be remanded to the Supreme Court, Kings County with directions that the plea be vacated and the case proceed on the basis of a plea of not guilty to the indictments sought to have been compromised by the pleas of guilty. Consider the following:

In Selikoff, there was a promise of no incarceration,

In this case there was a promise of no incarceration

In Selikoff the presentence report revealed that the original promise should not be kept

In this case, defendant's arrest and indictment on other charges convinced the trial judge that the original promise should not be kept.

In Selikoff, the trial judge offered to let defendant withdraw the plea.

In this case, the trial judge refused to let the defendant withdraw the plea.

Fact matching of Selikoff and this case shows only one significant difference. Murello did not get what Selikoff got, and Murello wanted only what Selikoff was entitled to, to wit, the

right to withdraw the plea. For the refusal to grant the defendant's application to withdraw the plea, there must be reversal here.

The second reason for reversal here is supplied by the American Bar Association Project on Minimum Standards for Criminal Justice Standards Relating to Pleas of Guilty, §§2.1(a)(ii)(5); 3.3. (1968). Section 2.1 and The Function of the Trial Judge §4.1(c)(iii)(a)(ii) provides, in material part:

2.1 Plea withdrawal.

(a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

(ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that: ...

(5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea.

(iii) The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered....

3.3. Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs, but later decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere....

Section 4.1 of the ABA standards relating to the function of the trial judge provides:

4.1 Role of the judge in plea discussions and plea agreements.

(a) The trial judge should not be involved with plea discussions before the parties have reached an agreement other than to facilitate fulfillment of the obligation of the prosecutor and defense counsel to explore with each other the possibility of disposition without trial....

(c) If the plea agreement contemplates the granting of charge or sentence concessions by the trial judge, he should:

(iii) permit withdrawal of the plea (or, if it has not yet been accepted, withdrawal of the tender of the plea) in any case in which the judge determines not to grant the charge or sentence concessions contemplated by the agreement.

The ABA standards just cited point to the same rule as that found in People v. Selikoff (supra, 35 NY2d 227), i.e., if a guilty-pleading defendant is not going to get what was promised, then the defendant shall be allowed to withdraw his plea. The amendments recommended by The Special Committee on Minimum Standards for the Administration of Criminal Justice (Hon. J. Edward Lumbard, Chairman; March 1968) contains the following observation in connection with this matter:

Under the proposed change to section 3.3(b), if the trial judge later changes his mind, he must inform the defendant of this fact and provide the defendant with an opportunity to withdraw his plea. The basis for the proposed change is that even though the prior concurrence of the trial judge was conditional, so that strictly speaking his later decision on final disposition is not contradictory, it nonetheless seems fair to give the defendant an opportunity to withdraw his plea. If the judge were not to give the defendant this chance, but instead held the defendant to his plea and refused to grant the concessions contemplated in the plea agreement, the defendant would probably believe that he had been dealt with unfairly. There are obvious reasons, from a correctional standpoint, why a defendant should be satisfied that he was treated fairly when he arrives at the penitentiary. It should be noted that such a situation will only arise when the judge chooses to give advance notice as to his concurrence in the agreement. When he does so, it is believed that the occasions in which he finds need to change his mind will be exceedingly rare.

Consonant with the rule of the Selikoff case, and the principles of the American Bar Association Minimum Standards just quoted, are

the provisions of the American Law Institute Model Code of Pre-arraignment Procedure, §350.6 (Tent. Draft No. 5, 1972) which provides:

If, at the time of sentencing, the court for any reason determines to impose a sentence more severe than that provided for in a plea agreement between the parties, the court shall inform the defendant of that fact and shall inform the defendant that the court will entertain a motion to withdraw the guilty plea. The court after pronouncing the sentence of a defendant who has pleaded guilty or nolo contendere shall inquire of the defendant personally whether the sentence pronounced violates any agreement or understanding the defendant had with respect to the sentence. If the court determines that the sentence pronounced is inconsistent with an agreement, or that it differs from the defendant's understanding in such a way that it would be unjust to permit the defendant's plea to stand, it shall vacate the plea.

The rationale behind the ALI proposal is provided in the following from the note on §350.6:

This section directs the court to vacate the defendant's guilty plea if at the time of sentencing it decides it cannot sentence the defendant in accordance with the agreement. See, e.g., United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y.) 1966). On the basis of a suggestion at the Advisory Committee meeting, the first sentence has been revised to permit the judge to entertain a motion to vacate rather than providing for automatic vacating of the plea in the event of a more severe sentence. This may save time in those cases in which the defendant is prepared to plead guilty notwithstanding the change....

Based on all the foregoing, one conclusion, and only one conclusion flows: Murello should have been allowed to withdraw his plea as his attorney asked. Since this timely application was denied, this Court must reverse and send the matter back for proceedings upon the original indictments, to which the original pleas of not guilty apply.

The weight of authority clearly supports the rule argued for in this case: If the plea of guilty is entered in reliance upon a promised disposition, and the trial Judge determines that the promised disposition cannot properly be made, then the defendant

must be given at least the opportunity to withdraw his plea.

In People v. Reibe (40 Ill. 2d 565, 241 N.E.2d 313, 314-315 [1968]) the court, per Schaeffer, J., made the following observations:

"The trial judge participated in the negotiations that preceded the plea of guilty, and at that time stated that the minimum sentence would be "in the area" of the minimum sentences agreeable to the prosecution and the defense - that is, in the area of 20 years. When the trial judge thereafter changed his mind, and was no longer willing to impose minimum sentences of that duration, fairness required that he so inform the defendant and afford him an opportunity to withdraw his plea of guilty. See, A.B.A. Minimum Standards for the Administration of Criminal Justice: Pleas of Guilty, Revised Standards 3.3,2.1."

Riebe was followed in People v. Palma (25 Mich. App. 682, 181 N.W. 2d 808, 810 [1970]) where the court, citing Riebe said:

"When the judge realized that he could not grant leniency because of subsequent convictions, recent well-reasoned authority suggests that he had a duty to so inform the defendant and give him an opportunity to withdraw his guilty plea."

The general American rule on the subject is summed up in Commonwealth v. Barrett (223 Pa. Super. 163, 299 A.2d 30, 32-33 [1972]):

"The majority of jurisdictions that have faced this issue permit the withdrawal of a guilty plea when a plea bargained is not kept. See, e.g., White v. Gaffney, 435 F. 2d 1241 (10th Cir. 1970); People v. Fratianno, 6 Cal.App.3d 211, 85 Cal. Rptr. 735 (1970); State v. Wolske, 280 Minn. 465, 160 N.W.2d 146 (1968); People v. Sigafus, 39 Ill.2d 68, 233 N.E.2d 386 (1968); This Court, in Commonwealth v. Todd, 186 Pa. Super. 272, 278, 142 A.2d 174 (1958), held that it was reversible error for the trial judge to deny appellant's withdrawal of his guilty pleas, where it was entered pursuant to an agreement."

See also: People v. Griffith (43 AD2d 20 [1st Dept. 1973]); Quintand v. Robinson (31 Conn Super. 22, 319 A.2d 515, 518 [1973]); State v. Fisher (223 NW2d 243 [Iowa, 1974]); State v. Farris (32 A.2d 642 [N.H. 1974]); State v. Theurer (118 N.J. Super. 485, 288

A.2d 587 [1972]); Commonwealth v. Dickerson (449 Pa. 70, 295 A.2d 282 [1972]); Commonwealth v. Evans (434 Pa. 52, 252 A.2d 689 [1969]); Culbraith v. Rundle (466 F.2d 720 [3d Cir. 1972]; Proposed Amendments to Criminal Rules, 52 F.R.D. 409, 429-431 (1971).

Direct participation by the Trial Judge in arriving at the plea bargain has been roundly condemned elsewhere, see ABA Standards quoted above and People v. Clark (515 P.2d 1242 [Colo. 1973]); Commonwealth v. Vanutti (454 Pa. 344, 312 A.2d 42 [1973]); Farrar v. State (52 Wis. 2d 651 191 NW2d 914 [1971]); Rahhal v. State (52 Wis. 2d 144, 187 NW2d 800 [1971]); Young v. State (49 Wis. 2d 361, 182 N.W. 2d 262 [1971]).

In sum, we ask this Court to adopt the salubrious principles articulated in People v. Griffith (43AD2d 20,26):

"Guilty pleas should be encouraged, but the judicial function should be limited to determining: that its acceptance is in the public interest and receiving assurance from the defendant that he understands the nature of the plea; that the plea is freely and voluntarily made with full knowledge of the constitutional rights defendant is thereby waiving; that defendant committed the acts to which he is pleading guilty (or is knowingly and intelligently willing to plead guilty, without an express admission of guilt, to avoid the consequences of a conviction [cf. North Carolina v. Alford, 400 U.S. 25]); and that no promises by way of inducement have been made to defendant by his lawyer, the District Attorney, the court or anyone else other than those clearly and fully spread on the record. The only suggested deviation from the ABA standard is that if a sentence agreement is part of the bargain struck, the Judge should carefully advise the defendant that he is not bound by any such recommendation and that if he cannot impose the recommended sentence, after receipt and examination of the pre-sentence report, defendant would be permitted to withdraw his plea if he then disagreed with the court's proposed sentence. While we recognize the risks inherent in even this limited judicial participation (see, e.g., United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254-255; American

Bar Association Standards, supra, p. 73), we must give consideration to currently prevailing practices and the likelihood of any agreements being reached without such stipulation."

Application of these principles requires reversal here.

The particular vice of direct judicial participation in the plea bargaining process, is that the Judge brings to bear, by inference if not in fact, the majesty of the office upon the defendant's decision whether to plead or not. See cases cited above and, People v. Clark (515 P.2d 1242 [Colo. 1973]); State v. Wolske (160 NW2d 146 [Minn. 1968]); Marchibroda v. United States (368 U.S. 487, 510 [1962]); Brown v. Peyton (435 F.2d 1352 [4th Cir. 1970]); See also, United States v. Frantoro (452 F2d 406 [5th Cir. 1971]); Lassiter v. Turner (423 F.2d 897 [4th Cir. 1970]); Bailey v. MacDougall (392 F2d 155 [4th Cir. 1968]); Brown v. Beto (377 F2d 950 [5th Cir. 1967]).

Ample state and federal authority establish that absent prejudice to the prosecution, withdrawal pleas of guilty should be liberally allowed if withdrawal is sought before sentence is imposed; see generally, Commonwealth v. Sanutti (454 Pa. 344; 312 A.2d 4 [1973]); Commonwealth v. Woods (452 Pa. 546, 307 A.2d 880 [1973]); Commonwealth v. Evans (434 Pa. 52 252 A.2d 689 [1969]); Libke v. State (60 Wis. 2d 121, 208 NW2d 331 [1973]); United States v. Tabor (462 F2d 352 [4th Cir. 1972]); Fed. Rule Crim. Proc. R2d(d); see Wright, Federal Practice and Procedure §538.

CONCLUSION

FROM ALL THE FOREGOING IT APPEARS THAT THE JUDGMENTS
APPEALED FROM SHOULD BE REVERSED AND THE MATTER REMANDED TO
THE SUPREME COURT, KINGS COUNTY FOR FURTHER PROCEEDINGS
UPON THE ORIGINAL INDICAMENTS

Respectfully submitted

Richard T. Farrell
Attorney for Appellant

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